

more peripheral devices, said method further comprising the step of receiving and storing said control program.

31. The method of claim 30, wherein said one or more peripheral devices include one of a matrix switch and a digital switch operatively connected to said first storage station, said method further comprising the step of receiving and storing an identifier designating information to be communicated by said one of said matrix switch and said digital switch.

32. The method of claim 30, wherein said storage station includes at least one of (1) a first tape player and (2) a memory operatively connected to a computer.

33. The method of claim 30, wherein said first programming is received in an analog television signal.

34. The method of claim 30, wherein said first programming is received in a digital television signal.

35. The method of claim 20, further comprising the step of storing said second programming.

36. The method of claim 35, wherein said second programming includes at least some of an intermediate generation set and a program instruction set.

II. REMARKS

A. Introduction

The Office Action dated December 23, 1997 (Office Action) has been carefully reviewed and the foregoing amendments made in response thereto.

Claim 8 is amended. Claims 3-36 are pending in the application.

Claims 3-36 would be allowable if rewritten or amended to overcome the rejections under 35 U.S.C. § 112.

Claims 3-36 are rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention.

Claims 8-19 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention.

Claims 3-36 remain active in this application. No new matter is presented in the foregoing amendments. Approval and entry of same is respectfully requested.

B. Response to Requirement Imposed Upon Applicants to Resolve Alleged Conflicts Between Applicants' Applications.

Applicants respectfully traverse the requirements of the Office Action paragraph 4.

Paragraph 4 of the Office Action requires Applicants to either:

- (1) file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications; or
- (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or
- (3) resolve all conflicts between claims in the related 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications.

In addition, Examiner states that failure to comply with any one of these requirements will result in abandonment of the application.

Examiner states that the requirement has been made because conflicts exist between claims of the related co-pending applications, including the present application. Examiner sets forth only the serial numbers of the co-pending applications without an indication of which claims are conflicting. Examiner has also attached an Appendix providing what is deemed to be clear evidence that conflicting claims exist between the 328 related co-pending applications and the present application. Further,

Examiner states that an analysis of all claims in the 328 related co-pending applications would be an extreme burden on the Office requiring millions of claim comparisons.

Applicants respectfully traverse these requirements in that Examiner has both improperly imposed the requirements, and has incorrectly indicated that abandonment will occur upon failure to comply with the requirement. Applicants' traversal is supported by the fact that 37 C.F.R. § 1.78 (b) does not, under the present circumstances, provide Examiner with authority to require Applicants to either: 1) file terminal disclaimers; 2) file an affidavit; or 3) resolve all apparent conflicts. Additionally, the penalty of abandonment of the instant application for failure to comply with the aforementioned requirement is improper for being outside the legitimate authority to impose abandonment upon an application. The following remarks in Section (B) will explain Applicants' basis for this traversal.

1. The PTO's New Requirement is an Unlawfully Promulgated Substantive Rule Outside the Commissioner's Statutory Grant of Power

The PTO Commissioner obtains his statutory rulemaking authority from the Congress through the provisions of Title 35 of the United States Code. The broadest grant of rulemaking authority – 35 U.S.C. § 6 (a) -- permits the Commissioner to promulgate regulations directed only to “the conduct of proceedings in the [PTO]”. This provision does NOT grant the Commissioner authority to issue substantive rules of patent law. Animal Legal Defense Fund v. Quigg, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).¹ Applicants respectfully submit that the Examiner's creation of a new set of requirements based upon 37 CFR § 1.78(b) constitutes an unlawful

¹Accord Hoechst Aktiengesellschaft v. Quigg, 917 F.2d 522, 526, 16 USPQ2d 1549, 1552 (Fed. Cir. 1990); Glaxo Operations UK Ltd. v. Quigg, 894 F.2d 392, 398-99, 13 USPQ2d 1628, 1632-33 (Fed. Cir. 1990); Ethicon Inc. v. Quigg, 849 F.2d 1422, 1425, 7 USPQ2d 1152, 1154 (Fed. Cir 1988).

promulgation of a substantive rule in direct contradiction of a long-established statutory and regulatory scheme.

2. The PTO's Requirement is a Substantive Rule

The first determination is whether the requirement as imposed by the PTO upon Applicants is substantive or a procedural rule. The Administrative Procedure Act offers general guidelines under which all administrative agencies must operate. A fundamental premise of administrative law is that administrative agencies must act solely within their statutory grant of power. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The PTO Commissioner has NOT been granted power to promulgate substantive rules of patent law. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).

The appropriate test for such a determination is an assessment of the rule's impact on the Applicants' rights and interests under the patent laws. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995). As the PTO Commissioner has no power to promulgate substantive rules, the Commissioner receives no deference in his interpretation of the statutes and laws that give rise to the instant requirement. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). When agency rules either (a) depart from existing practice or (b) impact the substantive rights and interests of the effected party, the rule must be considered substantive. *Nat'l Ass'n of Home Health Agencies v. Scheiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983).

**a. The PTO Requirement is Substantive
Because it Radically Changes Long Existing
Patent Practice by Creating a New
Requirement Upon Applicants Outside the
Scope of 37 C.F.R. § 1.78 (b)**

The Examiner's requirement is totally distinguishable from the well articulated requirement authorized by 37 CFR § 1.78 (b), because it (1) creates and imposes a new requirement to avoid abandonment of the application based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective final double patenting rejection without the PTO's affirmative double patenting rejection of the claims. Long existing patent practice recognizes only two types of double patenting, double patenting based on 35 U.S.C. § 101 (statutory double patenting) and double patenting analogous to 35 U.S.C. § 103 (the well-known obviousness type double patenting).² These two well established types of double patenting use an objective standard to determine when they are appropriate³ and have a determinable result on the allowability of the pending claims.

The Examiner's new requirement represents a radical departure from long existing patent practice relevant to conflicting claims between co-pending applications of the same inventive entity. Two well established double patenting standards are based on an objective analysis of comparing pending and *allowed* claims. However, in the

²MPEP § 804(B)(1) states, in an admittedly awkward fashion, that the inquiry for obviousness type double patenting is analogous to a rejection under 35 U.S.C. 103: "since the analysis employed in an obvious-type double patenting determination parallels the guidelines for a 35 U.S.C. 103 rejection, the factual inquires set forth in Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103 are employed when making an obvious-type double patenting analysis".

³The objective test for same invention double patenting is whether one of the claims being compared could be literally infringed without literally infringing the other. The objective test for obviousness type double patenting is the same as the objective nonobviousness requirement of patentability with the difference that the disclosure of the first patent may not be used as prior art.

present application, there are no *allowed* claims. The Examiner's new requirement to avoid a double patenting rejection presumes that conflicts exist between claims in the present application and claims in the 327 copending applications. This presumption of conflicts between claims represents a radical departure from long existing patent practice as defined by 37 C.F.R. § 1.78 (b), which states:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

Clearly, the only requirement authorized by the rule is the elimination of conflicting claims from all but one application where conflicting claims have been determined to exist. Furthermore, in order to determine that conflicting claims do in fact exist in multiple applications, the only possible analysis is obviousness-type double patenting, since there are no allowed or issued claims by which to employ the 35 U.S.C. § 101 statutory double patenting analysis. Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

In summary, the Examiner's new requirement departs from long-established practice because it (1) creates and imposes a new requirement to avoid abandonment of the application based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective final double patenting rejection without the PTO's affirmative double patenting rejection of the claims.

Therefore, the Examiner's new requirement departs from existing practice and therefore is a substantive rule beyond the authority of the PTO and is therefore, invalid.

b. The New Requirement is Also a Substantive Rule Because it Adversely Impacts the Rights and Interests of Applicants to Benefits of the Patent

The rights and benefits of a U.S. patent is solely a statutory right. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996). The essential statutory right in a patent is the right to exclude others from making, using and selling the claimed invention during the term of the patent. Courts have recognized that sometimes new procedural rules of the PTO are actually substantive rules, e.g. when the new rule made a substantive difference in the ability of the applicant to claim his discovery. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1214 (D.D.C. 1995) (emphasis added), citing, *In re Pilkington*, 411 F.2d 1345, 1349; 162 USPQ 145 (CCPA 1969); and *In re Steppan*, 394 F.2d 1013, 1019; 156 USPQ 143 (CCPA 1967).

The new requirement, on its face and as applied here, is an instance of a PTO rule making a substantive difference in Applicants' ability to claim their invention and, therefore, must be considered a substantive rule. The requirement denies Applicants rights and benefits expressly conferred by the patent statute. The measure of the value of these denied rights and benefits is that the requirement, as applied here, would deny Applicants the full and complete PTO examination of Applicants' claims on their merits, as specified by 37 C.F.R. § 1.105. In addition, to file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications based on the PTO's incomplete examination on the merits would deny Applicants the benefit of the full patent term of 17 years on each of Applicants' respective applications. Applicants respectfully submit that the requirement has a huge impact on their rights and interests in the presently claimed invention.

c. Conclusion: Substantive Rule

In summary, the requirement is a change to long existing practice and/or has a substantive impact on the rights and interests of Applicants to their invention. Either

finding means that the new requirement is a substantive rule. Since the Commissioner has no power to issue substantive rules, the requirement is an improperly promulgated substantive rule having no force of law.

3. The PTO Requirement is Outside the Scope of 37 C.F.R. § 1.78 (b)

Rule 78 (b) states that:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

The only **requirement** that Rule 78 (b) authorizes is the elimination of conflicting claims from all but one co-pending applications.

In the instant Office Action, Examiner has not required the elimination of all conflicting claims from all but one application, but instead has required Applicants to: 1) file terminal disclaimers in each of the related 328 applications; 2) provide an affidavit; or 3) resolve all conflicts between claims in the related 328 applications. None of the options in the requirement is authorized by Rule 78 (b), and therefore Applicants respectfully submit that such a requirement is improper.

With respect to the PTO's authority to act within Rule 78 (b) regarding the rejection of conflicting claims, MPEP § 822.01 states that:

Under 37 CFR § 1.78 (b), the practice relative to overlapping claims in applications copending before the examiner..., is as follows: Where claims in one application are unpatentable over claims of another application of the same inventive entity because they recite the same invention, *a complete examination should be made of the claims of each application* and all appropriate rejections should be entered in each application, including rejections based upon prior art. *The claims of each application may also be rejected on the grounds of provisional double patenting on the claims of the other application* whether or not any claims avoid the prior art. Where appropriate, the same prior art may be relied upon in each of the applications. MPEP 822.01 (6th Ed., Rev. 3, 1997), (*emphasis added*).

In light of the requirement of the Office Action, MPEP § 822.01 and 37 CFR § 1.78 (b) are not applicable since there has not been any rejection with regard to the elimination of conflicting claims from all but one co-pending application.

4. The Assertion That Failure to Comply with the Requirement Will Result in Abandonment of Applicants' Application is Improper

Applicants' prospective failure to comply with the above requirements cannot properly result in abandonment of the present application. Applicants respectfully submit that abandonment of an application can properly occur only:

- (1) for failure to respond within a provided time period (under Rule 135);
- (2) as an express abandonment (under Rule 138); or
- (3) the result of failing to timely pay the issue fee (under Rule 316).

There is no provision in the rules permitting abandonment for failure to comply with any of the presented requirements. To impose an improper requirement upon Applicants and then hold the application is to be abandoned for failure to comply with the improper requirement violates the rules of practice before the USPTO. Furthermore, Examiner is in effect attempting to create a substantive rule which is above and beyond the rulemaking authority of the USPTO, and therefore is invalid.

In the *Application of Mott*, 539 F.2d 1291, 190 USPQ 536 (CCPA 1976), the applicant had conflicting claims in multiple applications. The CCPA held that action by the Examiner which would result in automatic abandonment of the application was legally untenable. *Id.* at 1296, 190 USPQ at 541. In the present application, Examiner has asserted that there are conflicting claims in multiple applications, and that non-compliance of the Office Action's requirement will result in an automatic abandonment. Therefore, under *Mott's* analysis, the Office Action's result of abandonment of Applicants' application is legally untenable.

5. Response to Apparent Conflict of Claims

Applicants submit that the presentation of the Office Action Appendix fails to demonstrate any conflicts between claims of the present application and claims of the co-pending applications. Rather, the Office Action Appendix compares representative claims of *other* applications in attempt to establish that "conflicting claims exist between the 328 related co-pending applications." Absent any evidence of conflicting claims between the Applicants' present application and any other of Applicants' co-pending applications, any requirement imposed upon Applicants to resolve such alleged conflicts is improper.

6. Request for Withdrawal of Requirement

Therefore, Applicants respectfully request that Examiner reconsider and withdraw the requirement that Applicants: (1) file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications; (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or (3) resolve all conflicts between claims in the above identified 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications, which upon failing to do so will abandon the application.

7. Filing of Supplemental Oath

Notwithstanding the foregoing, Applicants will file a supplemental oath under 37 C.F.R. § 1.67 for each application when Examiner identifies allowable subject matter. Applicants respectfully propose that the filing of individual supplemental oaths attesting to the absence of claim conflicts between previously patented claims and subsequently allowed claims is a more reasonable method of ensuring the patentable distinctness of subsequently allowed claims.

Under 37 C.F.R. § 1.105, § 1.106 & § 1.78 (b), Examiner has the duty to make every applicable rejection, including double patenting rejection. Failure to make every proper rejection denies Applicants all rights and benefits related thereto, e.g., Applicants' right to appeal, etc. Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

C. Information Disclosure Statement

The Applicants appreciate the Examiner's review of the Information Disclosure Statements filed 12/6/95, 12/11/95, 12/22/95, 2/6/96, 4/17/96 and 4/7/97 and have addressed those specific concerns raised in paragraph 5 of the Office Action. It is the Applicants' understanding that the Examiner raised the following 5 issues:

- (1) the reasons for such a large number of references cited,
- (2) foreign language references cited without a statement of relevance or translation have not been considered,
- (3) the relevancy of numerous references listed in the Information Disclosure Statements are subsequent to the Applicants' latest effective filing date of 9/11/87,
- (4) citation of references apparently unrelated to the subject matter of the claimed invention, and
- (5) citation of database search results listed in foreign languages where no copy was provided.

1. Reason for Citation of Large Number of References

The reason that the Applicants submitted such a large number of references in the Information Disclosure Statements was that a large portion of the information cited by the Applicants was brought to the Applicants' attention in the discovery processes in a previous litigation in the United States District Court for the Eastern District of

Virginia (*Personalized Mass Media Corp. v. The Weather Channel, Inc.* Docket No. 2:95 cv 242) and an investigation by the International Trade Commission (*In the Matter of Certain Digital Satellite System (DSS) Receivers And Components Thereof*, No. 337 TA 392, which was direct to U.S. Pat. No. 5,335,277) regarding claims in the Applicants' related issued patents. The documents listed in the Information Disclosure Statement were cited during the previous litigation/investigative proceedings by the alleged infringers in the aforementioned proceedings as being relevant and material to patentability of the claims in the related patents. The Applicants submitted those materials in the Information Disclosure Statement to the PTO at the earliest possible time in order to file them in compliance with the 3 month requirement stated in the certification used to submit the Information Disclosure Statement before the Office Action was issued as is necessary under 37 CFR § 1.97 (c) (1). In such haste, entries were inadvertently submitted which do not appear on their face to be material to the patentability of the present application. Applicants have corrected this error with the submission of the corrected Information Disclosure Statement as shown in Appendix B. However, it is the Applicants' understanding that not all references cited must be material to patentability in order for such references to be considered. In § 609 of the MPEP, it states,

"[t]hese individuals also may want the Office to consider information for a variety of reasons: e.g., without first determining whether the information meets any particular standard of materiality, or because another patent office considered the information to be relevant in a counterpart or related patent application filed in another country, or to make sure that the examiner has an opportunity to consider the same information that was considered by the individuals that were substantially involved in the preparation or prosecution of a patent application."

Applicants' position is that information that was considered material in previous litigation would fall into the 'variety of reasons' category as stated above. Applicants intention was not to confuse or make difficult the examination process for the Examiner, but was instead to be forthright and open in disclosing all information deemed to be relevant to the application in issue by third parties.

2. Citations of Foreign Language References

Applicants have re-examined the foreign references listed in all of the Information Disclosure Statements and have either eliminated such references from the list, included translations herewith or provided statements as to the relevancy of such references (APPENDIX A). The inclusion of translations with this response is in compliance with 37 C.F.R. § 1.97 (f) which states in part, "[I]f a bona fide attempt is made to comply with 37 C.F.R. § 1.98, but part of the required content is inadvertently omitted, additional time may be given to enable full compliance." The omission of any translations and/or relevancy statements for foreign references were inadvertent and unintentional and are herein submitted in accordance with 37 C.F.R. § 1.97 (f).

3. References in the Information Disclosure Statements Subsequent to Applicants' Latest Effective Filing Date of 9/11/87

Examiner stated "[n]umerous references listed in the IDS are subsequent to the applicant's latest effective filing date of 9/11/87, therefore, the relevancy of those references is unclear." Upon further examination, the Applicants have eliminated those patents and publications after the effective filing date for the present application. It is the Applicants' understanding that the effective filing date for the present application is 9/11/87.

4. Citation of Unrelated References

Applicants appreciate the Examiner pointing out such references that were listed yet on their face appear to be unrelated to the subject matter of the present application. In response to such information, the Applicants have reviewed the cited references and removed any such references which appear to be unrelated on their face to the claimed subject matter such as the patent for a beehive, the patent for a chemical compound and numerous computer printout search results.

5. Citation of Database Search Results

Database search results listed in foreign languages where no copy was provided have been eliminated from the substitute Information Disclosure Statement included with this office action.

The Applicants offer the corrected Information Disclosure Statement (APPENDIX B) as a substitute to the previously filed Information Disclosure Statement filed 4/7/97. No new entries have been entered, only citations which have, upon further examination, been determined not to be relevant to the claimed subject matter have been eliminated, typographical errors have been corrected, dates inserted where possible and the list shortened as a result. It is the Applicants' intention that such corrected Information Disclosure Statement will help clarify any issues previously raised by the Examiner and aid in the prosecution of the present patent application.

D. Response to Rejections under 35 U.S.C. § 112

1. Specification Support of Claims 3-36

Paragraph 6 of the Office Action rejects claims 3-36 under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention. The Office Action specified language of claims 3 and 8 as not being supported by the specification as originally filed. The Office Action requests support for the method steps of using a "programming requirement signal".

The following tables list Applicants' claim language in the left column which corresponds to the specification support in the right column.

a. Claim 3

a programming requirement signal	For example, page 326, lines 30-35, especially lines 33-35 with respect, for example, to page 343, lines 18 through page 344, line 22 and page 346, line 35 through page 347, line 5.
locating an available programming storage space based on said step of storing a requirement signal	For example, page 332 in line 4-13, page 331, line 17 through page 334, line 6 based on page 348, line 30 through page 349, line 22.

b. Claim 8

effecting a transmitter station to process a programming requirement signal which is effective to enable said transmitter station to locate an available programming storage space in which to store said first programming	For example, page 344, lines 30-32, page 345, lines 7-9 and page 346, line 35 through page 347, line 4 with page 332, lines 4-13 in page 331 line 17 through page 334, line 6 based on page 348, line 30 through page 349, line 22.
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Claims 4-7, 20-36 and 9-19 are dependent upon claims 3 and 8 respectively.

Applicants contend that the specification support provided above for the independent claims renders the dependent claims allowable.

2. Rejections Under 35 U.S.C. §112, Second Paragraph

Claims 8-19 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicants regard as the invention.

Applicants have amended claim 8 to correct the antecedent basis problem.

Claims 9-19 depend upon claim 8. Applicants contend that the correction of claim 8 renders the rejection of the dependent claims moot.

3. Conclusion

Applicants respectfully submit that claims 3-7 and 9-36 and amended claim 8 of the subject application particularly point out and claim the subject matter sufficiently for one of ordinary skill in the art to comprehend the bounds of the claimed invention. The test for definiteness of a claim is whether one skilled in the art would understand the bounds of the patent claim when read in light of the specification, and if the claims so read reasonably apprise those skilled in the art of the scope of the invention, no more is required. *Credle v. Bond*, 25 F.3d 1556, 30 USPQ2d 1911 (Fed. Cir. 1994). The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir. 1994). Applicants have amended the claims to enhance clarity and respectfully submit that all pending claims are fully enabled by the specification and distinctly indicate the metes and bounds of the claimed subject matter.

Applicants believe that the above recited changes are sufficient to overcome the rejections under 35 U.S.C. 112, first and second paragraph, and respectfully request withdrawal of these rejections. Applicants provide these specific embodiments in support of the pending claims by way of example only. The claims must be read as broadly as is reasonable in light of the specification, and Applicants in no way intend that their submission of excerpts/examples be construed to unnecessarily restrict the scope of the claimed subject matter.

III. CONCLUSION

In accordance with the foregoing it is respectfully submitted that all outstanding objections and rejections have been overcome and/or rendered moot. Further, all pending claims are patentably distinguishable over the prior art of record, taken in any proper combination. Thus, there being no further outstanding objections or rejections, the application is submitted as being in a condition for allowance, which action is earnestly solicited.

If the Examiner has any remaining informalities to be addressed, it is believed that prosecution can be expedited by the Examiner contacting the undersigned attorney for a telephone interview to discuss resolution of such informalities.

Respectfully submitted,



Reg. No. 141933
for,

Thomas J. Scott, Jr.
Reg. No. 27,836
Attorney for Applicants
Tel: (202) 383-6790

Date: June 19, 1998
HOWREY & SIMON
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004